

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

|   |   |                      |
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| In the Matter of                            | ) |                      |
|   | ) |                      |
| AT&T Corp. Petition for Declaratory Ruling  | ) | WC Docket No. 03-133 |
| Regarding Enhanced Prepaid Calling Card     | ) |                      |
| Services                                    | ) |                      |
|   | ) |                      |
| Regulation of Prepaid Calling Card Services | ) | WC Docket No. 05-68  |

**COMMENTS OF WILTEL COMMUNICATIONS, LLC**

WilTel Communications, LLC (“WilTel”) respectfully submits these Comments in response to the *Order and Notice of Proposed Rulemaking* in the proceeding captioned above.<sup>1</sup> In the *Order and NPRM*, the Federal Communications Commission (“FCC” or “Commission”) acted correctly and forcefully to make clear that companies cannot obtain an unfair advantage over similarly situated competitors simply by labeling a Telecommunications Service as “enhanced” and thereby escaping the regulatory obligations with which its competitors must comply. In so doing, the Commission took a necessary step to make sure that market considerations and not artificial regulatory distinctions determine how telecommunications companies spend their time, effort and money. In the *NPRM* portion of this proceeding, WilTel urges the Commission not to take any action that would reverse this progress.

**I. Introduction and Summary**

WilTel applauds the Commission’s decision in the *Order and NPRM* that a prepaid calling card service that allows a user to make a telephone call after dialing the numbers necessary to use the card and hearing an announcement is a

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<sup>1</sup> *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, Order and Notice of Proposed Rulemaking (released February 23, 2005) (“*Order and NPRM*”).

Telecommunications Service and subject to access charges and Universal Service Fund (“USF”) contributions. As a result of this decision, the law applying to prepaid calling card services today is clear that a customer using such service to make a TDM-to-TDM telephone call is using Telecommunications Services regardless of whether (a) there is an intervening announcement; (b) the caller has the option to choose to make non-Telecommunications Services calls; or (c) the underlying service provider(s) use(s) IP technology for part of the end-to-end transmission. To the extent the Commission seeks comment on whether to reclassify such prepaid calling card services as Information Services, WilTel opposes such reclassification and urges the Commission to hold that they are still subject to access charges and USF contribution requirements.

The Commission must make its rules absolutely clear. Any ambiguity and delay provides an incentive for companies to take the position that similarly situated companies are subject to different regulatory obligations. These companies continue to ignore the Commissions rules, and therefore perpetuate the distortion to the industry and the harm being caused to consumers, honest competitors, and the universal service fund.

## **II. Prepaid Calling Card Services are Telecommunications Services Under Existing Law**

On November 22, 2004, AT&T sought a Commission ruling that two variations of its originally described prepaid calling card service were “enhanced” services because they either involved *changed information* or *interaction* with the end user (“First Variant”) or use of Internet protocol (IP) format for part of the call transmission (“Second Variant”).<sup>2</sup> With respect to the First Variant, AT&T stated that, an announcement prompts the user to press a number to obtain information about the card distributor or to

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<sup>2</sup> Letter from Judy Sello, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 22, 2004) (“*AT&T Letter*”).

make a call, either by staying on the line or by pressing a button.<sup>3</sup> With respect to the Second Variant, AT&T states that the user is provided the same information as in the originally described service or in the First Variant, but that transport is provided over an IP backbone.<sup>4</sup> AT&T further contended that other carriers were treating such variants as Information Services and not paying access charges or contributing to USF mechanisms.<sup>5</sup> Although the Commission did not specifically rule on AT&T's requests, its decision in the *Order and NPRM* makes it clear that, as a matter of law, both variants are Telecommunications Services subject to USF contribution obligations. Accordingly, the Commission immediately should take action to make sure providers of both Variants are contributing to USF mechanisms based on revenues from these services.

In the *Order and NPRM*, the Commission explained that prepaid calling card services are regulated as Telecommunications under the Act because they provide “transmission, between or among points specified by the user of information of the user’s choosing, without change in the form or content of the information as sent and received” and as Telecommunications Services where such Telecommunications is offered “for a fee directly to the public.”<sup>6</sup> The Commission held that such Telecommunications Services are not transformed into an Information Service where an enhancement is “incidental to the underlying service offered to the cardholder and does not ... alter the fundamental character of that telecommunications service,” for example where the enhancement is “merely a necessary precondition to placing a telephone call.”<sup>7</sup> The

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<sup>3</sup> *AT&T Letter* at 2.

<sup>4</sup> *AT&T Letter* at 3-4. See, e.g., *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004) (“*IP-in-the-Middle*”).

<sup>5</sup> *AT&T Letter* at 4.

<sup>6</sup> *Order and NPRM*, at ¶ 14 (citing 47 U.S.C. § 153 (43), (46)). “To date, calling card services have been regulated by the Commission as telecommunications services because they provide transmission of information, without a change in form or content, for a fee directly to the public.” *Order and NPRM* at ¶ 4.

<sup>7</sup> *Order and NPRM* at ¶ 16.

Commission also held that such Telecommunications Service is not transformed into an Information Service just because it contains an enhanced component,<sup>8</sup> but, rather, only when it is offered to customers in a “single, integrated information service” and “the underlying telecommunications cannot be separated from the data processing capabilities,” such that it changes the fundamental character of the calling card service.<sup>9</sup> Using these standards, the Commission held that the AT&T prepaid calling card at issue in the *Order and NPRM* was a Telecommunications Service and did not meet the criteria to be an Information Service.<sup>10</sup> Using these same standards, the Commission should reiterate that the First and Second Variants at issue herein are Telecommunications Services.

**A. Telephone Calls Made Under the First Variant Involve No Changed Information and No Meaningful Subscriber Interaction**

The Commission’s findings in the *Order and NPRM* apply with equal force to telephone calls made under the First Variant. The prepaid calling card services carrier provides the user a voice transmission service without change in form or content of the caller’s information, and the caller is being charged a fee for such service. Users buy the card “to make telephone calls, not listen to advertisements.”<sup>11</sup> Before it can make a telephone call, however, the user must listen to an advertisement inviting the user to press

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<sup>8</sup> *Order and NPRM* at ¶¶ 18-19.

<sup>9</sup> *Order and NPRM* at ¶¶ 20-21 (citing *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4822-23 (2002) (*Cable Modem Ruling*), *vacated in part and remanded*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9<sup>th</sup> Cir. 2003), *cert. granted*, 125 S. Ct. 655 (2004), and *cert. granted sub nom. National Cable & Telecomms. Ass’n v. Brand X Internet Services*, 125 S. Ct. 654 (2004)).

<sup>10</sup> *Order and NPRM* at ¶ 15 (“the mere insertion of the advertising message in calls made with AT&T’s prepaid calling cards does not alter the fundamental character of the calling card service” and transform that service into an information service under the Act and the Commission’s rules).

<sup>11</sup> *Order and NPRM* at ¶ 20. The cards are not advertised as information sources for the calling card vendor. Nor would one expect users to buy the cards for the purpose of learning about the vendor, given that the cards are bought either at the store itself or on the store’s website, both of which are places that the user can learn more about the vendor at no charge.

a button to hear more about the calling card vendor.<sup>12</sup> Once it hears this message, the user can dial the called number and then make the call. In all material respects, therefore, listening to the advertisement announcing the options is “merely a necessary precondition to placing a telephone call”.<sup>13</sup> Accordingly, the FCC rules and decisions already treat the telephone services described in AT&T’s First Variant as Telecommunications Services, and the FCC should take this opportunity to reiterate that treatment.

**B. The Potential for User Interaction with Stored Data in AT&T’s First Variant Does Not Transform the Telecommunications Services into an Information Service**

Although it is clear that telephone calls made using the service offered in the First Variant are Telecommunications Services, the Commission seeks comment on whether giving the user the option to ask to hear additional information satisfies the definition of Information Services. As described above, the option announcement itself is nothing more than an advertisement akin to that made available in the originally proposed service, and the option is not why the user buys the card. Accordingly, giving the user such an option does not in any way change the service into an Information Service.

Even if there were an enhanced component involved in the First Variant, that enhanced component does not transform the service into an Information Service. As an initial matter, a service offering or a service component cannot be considered “enhanced” or an Information Service unless it meets the statutory definition. As the Commission recognized, there must be an “offering” and a “capability” for “generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications.”<sup>14</sup> Although the First Variant differs slightly from AT&T’s

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<sup>12</sup> In this case, such additional information is nothing more than advertising whereby the caller is given “options” for obtaining marketing information about the card retailer. *AT&T Letter* at 3.

<sup>13</sup> *Order and NPRM* at ¶ 16.

<sup>14</sup> *Order and NPRM* at ¶ 15. See 47 U.S.C. § 153(20).

initially proposed service because AT&T appears to provide the user with a “capability” to interact with information, AT&T does not necessarily “offer” such capability. An “offer” generally means a willingness to take some action in exchange for something in return.<sup>15</sup> AT&T is not “offering” an enhanced capability to a potential customer unless, for example, AT&T expects to get paid in return for providing the capability.<sup>16</sup> Clearly, however, AT&T does not market and the user does not buy the card for the primary purpose of making telephone calls. The price itself reflects the price of a retail telephone service (less, perhaps, the costs of access and USF) and not of any enhancement. Accordingly, AT&T is not “offering” the enhanced capabilities but, rather, is “offering” a telephone service.

Moreover, the Commission’s rules are clear that an enhanced component in a service offering does not transform the entire service offering into an Information Service.<sup>17</sup> To the extent that the options offered under the First Variant constitute an enhancement, such enhancement is not offered to customers in a “single, integrated information service”, and “the underlying telecommunications [can] be separated from the data processing capabilities” without changing the fundamental character of the calling card service.<sup>18</sup> For one thing, the user can make a telephone call without ever asking to hear the options presented through the “enhancement”. For another, the

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<sup>15</sup> *Webster’s Ninth New Collegiate Dictionary* defines “offer” as “a presenting of something for acceptance” or “an undertaking to do an act or give something on condition that the party to whom the proposal is made so some specified act or make a return promise”. *Webster’s Ninth New Collegiate Dictionary* 819 (1991).

<sup>16</sup> Whether a service is being offered as an Information Service depends on a number of objective factors. For example, if the enhanced capability is being offered in conjunction with telephone services, then one would expect the asking price to reflect not just the value of the telephone calls but also the value of the enhanced capabilities. Moreover, the service’s marketing material should prominently advertise the enhanced capabilities. And a reasonable consumer should see some value in the enhanced capabilities.

<sup>17</sup> *See Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 16 FCC Rcd 7418 (2001).

<sup>18</sup> *Order and NPRM* at ¶¶ 20-21.

telecommunications component is easily identifiable from the enhanced component because the traffic and the intended users can be differentiated.

In the case of TDM-to-TDM prepaid calling card calls, the telephone call component is almost always separately distinguishable from any other components. The provider's call detail records contain specific information about the originating and terminating locations of landline calls. For example, the Commission has recognized that a service provider that carries the portion of the call going into the calling card platform and exiting the platform will almost always be able to tell whether a call is made to a called party.<sup>19</sup> Where a different carrier provides the terminating portion of the call, the platform provider (and the calling card provider that owns, operates or contracts with the platform provider) will know.<sup>20</sup> Moreover, many prepaid calling card calls are required to carry the calling party number ("CPN") of the originating location, so the terminating LEC should be able to tell whether a telephone call was completed.<sup>21</sup> Accordingly, there is virtually no chance that a telecommunications component of "mixed" prepaid calling card service will be so integrated into the enhanced component that it cannot be separately identified without altering the fundamental nature of the service.

In addition, any "enhanced" component of a prepaid calling card is offered as a clearly defined service to a separate user. On the one hand, the provider is selling prepaid long-distance calling service to individuals who purchase and use the card for telecommunications services. The card purchaser is paying for the ability to place a

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<sup>19</sup> See *The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order (rel. October 3, 2003), at ¶ 35, Order on Reconsideration, FCC 04-251 (released October 22, 2004).

<sup>20</sup> *Id.*

<sup>21</sup> 47 C.F.R. 64.1601 (a). Section 64.1601(d) describes several exceptions to this requirement, one of which applies to calls from payphones. Nevertheless, prepaid phone card calls from locations other than payphones are still required to pass CPN. Although many prepaid calling card service providers currently do not pass CPN, some do. Accordingly, passing CPN is feasible on prepaid calling card calls.

telephone call, nothing more. These calls are distinct from anything else that the user can use the card for and are identified on an end-to-end basis (*i.e.*, from the calling to the called party). Separately, the calling card provider is offering the ability to card retailers or other entities to advertise and promote themselves by way of placing advertisement messages on the calling cards. The user's call is routed from the calling card platform to the place where the announcements are stored. The advertisements are paid for by the card retailers and other advertisers, not the purchaser of the calling card.

In the event the Commission determines in this proceeding that the placement of advertising "options" for the caller to choose from falls within the literal definition of an enhanced service, then the Commission must see through AT&T's attempts to force these two distinct services into one and must address the proper treatment of each one separately for purposes of universal service contribution and access charge obligations. At most, therefore, using the enhanced functionality can be treated as an Information Services offered to advertisers; however, the telephone service use is and always has been a Telecommunications Service.

**C. Contrary to AT&T's Strained Legal Theory, Prepaid Calling Card Services are PSTN-to-PSTN Transmissions Under the *IP-in-the-Middle* Decision**

AT&T also contends that prepaid calling card services using IP-in-the-Middle are Information Services even if those not using IP-in-the-Middle are Telecommunications Services. In the *IP-in-the-Middle* decision, the Commission ruled that PSTN-to-PSTN transmissions are Telecommunications Services rather than Information Services even if they are routed over an Internet backbone within the network.<sup>22</sup> The FCC reasoned that such transmissions do not qualify as Information Services because they contained no net

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<sup>22</sup> *IP-in-the-Middle* at ¶ 10.



change in protocol and offered no enhanced functionality to end users due to the use of IP technology. The Commission said, however, that IP-in-the-Middle services that do not use 1+ dialing (such a prepaid calling card calls) were beyond the scope of that proceeding because such alternative dialing scenarios were not raised in the petition initiating the proceeding.<sup>23</sup>

Picking up on this statement, AT&T argues in its Second Variant that IP-in-the-Middle services using prepaid calling cards were not ruled to be Telecommunications Services in the *IP-in-the-Middle* order and therefore should be considered Information Services (because they use IP-in-the-Middle) even if the FCC rules that prepaid calling cards not using IP-in-the-Middle are Telecommunications Services. According to AT&T, therefore, a prepaid calling card provider can escape treatment as a Telecommunications Services provider (a) under the *Order and NPRM* by availing itself of the *IP-in-the-Middle* loophole and (b) under the *IP-in-the-Middle* decision by availing itself of the *Order and NPRM* loophole. AT&T insists on this conclusion because the FCC never said explicitly that such providers are Telecommunications Service providers, even though the legal effect of both decisions is clearly to treat such providers as Telecommunications Service providers.

With all due respect, AT&T seeks to make a laughingstock of the Commission's processes. The distinctions that AT&T raises to make its argument are distinctions without a difference. Nothing in a prepaid calling card call with IP-in-the-Middle is different from a 1+ call with IP-in-the-Middle. There is no net change in protocol, no enhanced functionality offered to end users due to IP technology and no "offering" of any "capability". A prepaid card call originated and terminated on the PSTN is a

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<sup>23</sup> *IP-in-the-Middle Order* at ¶ 13 n.58.

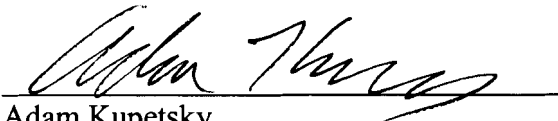
Telecommunications Services regardless of whether it is routed over an IP backbone. That law is settled based on the *IP-in-the-Middle Order* and the *Order and NPRM*. The Commission must not allow carriers to escape application of settled law and contributions to USF mechanisms just because they were not specifically named in the decision setting the law.

### **III. Conclusion**

The Commission is charged with enforcing its rules requiring the non-discriminatory application of access charges and universal service contributions. It took a laudable step in carrying out this function when it issued the *Order and NPRM* and called AT&T on its attempt to gain an artificial competitive advantage based on regulatory arbitrage rather than good business practices. The *Order and NPRM* decided many of the issues the Commission is raising in the *NPRM* portion of this proceeding, and WilTel urges the Commission not to undermine its progress to date by reconsidering its legal and policy conclusions.

Respectfully submitted,

WILTEL COMMUNICATIONS, LLC

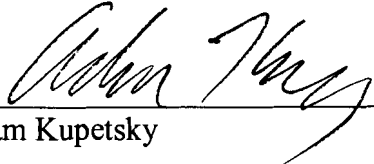
A handwritten signature in dark ink, appearing to read "Adam Kupetsky", is written over a horizontal line.

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April 15, 2005

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of WilTel Communications, LLC in WC Docket No. 03-133 and WC Docket No. 05-68 was delivered by electronic mail on the 15<sup>th</sup> day of April, 2005, to the parties listed below.

  
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